IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2008 Session

ELMER PAUL ALLEN ET AL. v. HISTORIC HOTELS OF NASHVILLE, LLC d/b/a HERMITAGE HOTEL ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C3085 Walter C. Kurtz, Judge

No. M2007-02423-COA-R3-CV - Filed December 9, 2008

The plaintiffs, husband and wife, filed this premises liability action for personal injuries sustained by the husband when a flag that had been draped over a painting, with large wooden dowel attached, fell and struck husband on the head. The incident occurred during an election night party hosted by the Tennessee Republican Party in the grand ballroom of the Hermitage Hotel in Nashville, Tennessee. The plaintiffs timely filed their action against the hotel. More than a year after the incident, the hotel filed its Answer to the Complaint in which it stated in an affirmative defense that "[t]o the extent that Plaintiffs claim that the offending condition was caused because of flags being placed in portraits, upon information and belief, said condition was created at the request of the organizing party of this election reception (the Republican Party of Tennessee) and if Plaintiffs contend that it was improper to request placement of the flags, Defendant identifies said organizer and host of the reception as a potentially negligent party to the extent supported by the proof." More than ninety days after the hotel's Answer was filed, the plaintiffs amended their complaint to add the Tennessee Republican Party (TRP) as an additional defendant. Thereafter, both defendants filed motions for summary judgment. The trial court summarily dismissed all claims against the defendants, finding no evidence that either defendant caused the flag to be draped over the painting, and that it was not foreseeable that its placement over the painting was dangerous or that it created an unreasonable risk of harm. The TRP also filed a motion for judgment on the pleadings, contending the action against it was time barred. The trial court denied that motion. We have concluded the plaintiffs' claims against the TRP are time barred; therefore, the TRP is entitled to judgment on the pleadings. As for the hotel, we have concluded the hotel failed to negate an essential element of the plaintiffs' claim and failed to establish that the plaintiffs cannot prove an essential element of their claim at trial; therefore, the hotel is not entitled to summary judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Michael D. Dillon, Nashville, Tennessee, for the appellants, Elmer Paul Allen and Robin Allen.

David L. Johnson, Nashville, Tennessee, for the appellee, Historic Hotels of Nashville, LLC d/b/a Hermitage Hotel.

Raymond D. Lackey, Franklin, Tennessee, for the appellee, Tennessee Republican Party.

OPINION

The matters at issue arise from injuries allegedly sustained by Elmer Paul Allen on the evening of November 2, 2004, during a crowded "election watch" party hosted by the Tennessee Republican Party ("TRP") in the grand ballroom of the Hermitage Hotel (the "hotel"). Around 10:00 p.m. that evening, Mr. Allen was standing below a large landscape painting that was hanging on the west wall of the ballroom when a large American flag that had been draped over the painting, along with the flag pole, fell and struck Mr. Allen on the head. Mr. Allen estimated the flag was five feet wide and nine feet long, and he described the flag pole as a wooden dowel, one and one-quarter inches in diameter, which was sewn into the seam of the flag. The flag and pole had been draped over the top of the painting, the top of which Mr. Allen estimated was six or seven feet above his head. When the flag fell, the pole struck Mr. Allen on the head, causing Mr. Allen to stagger but not rendering him unconscious.

In planning the event, the TRP requested the hotel cover the portraits of President Andrew Jackson, President James K. Polk, and President Andrew Johnson with American flags.[1] The TRP requested the hotel cover the historical portraits of the three presidents from Tennessee because each of them was Democrats.[2] As requested by the TRP, the hotel staff draped a flag over the top of each frame so the flag would drape over and thereby hide the presidential portraits.[3] As for the flag that fell on Mr. Allen, the hotel admits the TRP did not request the hotel place a flag over the landscape painting.[4]

The hotel and the TRP each deny providing or placing the flag that fell on Mr. Allen. Each defendant also insists it has no knowledge concerning who provided or placed the flag that fell on Mr. Allen. Nevertheless, it is undisputed that someone draped an American flag over the landscape painting, that it fell on Mr. Allen during the event, and that the hotel knew the flag was draped over

[1] The presidential portraits, which had been hanging for decades in the historic hotel in Nashville, Tennessee, were there because the three presidents were Tennesseans.

[2] Bob Davis, then Deputy Chair of the TRP, testified that the TRP had no interest in hanging flags over any other paintings in the ballroom other than the three Democratic presidential portraits.

[3] The hotel's banquet manager, Eugene Sessa, testified that he "thought" engineering hung the flags over the presidential portraits, and he recalled seeing a flag draped over a landscape painting on the west wall, across from the presidential portraits, but he did not recall who hung the flag over the landscape painting.

[4] Another hotel employee, John Powers, testified that he did not know who hung all the flags. Mr. Powers also testified that nobody from the TRP requested a ladder to hang anything that evening, but he admitted that if they had, he would have hung the flag at the request of the TRP.

the painting prior to it falling on Mr. Allen. It is also undisputed that the hotel knew that one of the flags it had placed over a presidential portrait had fallen prior to the incident involving Mr. Allen.

On October 6, 2005, eleven months after the election night event, Mr. Allen and his wife Robin Allen (the "plaintiffs") filed this premises liability action against Historic Hotels of Nashville, LLC d/b/a Hermitage Hotel, for injuries allegedly sustained as a result of the flag and pole falling on Mr. Allen. The TRP was not named as a defendant in the initial Complaint. The hotel filed its Answer to the Complaint on November 14, 2005, denying liability and in which it asserted "Affirmative and/or Additional Defenses," the relevant one of which reads as follows:

> 2. To the extent that Plaintiffs claim that the offending condition was caused because of flags being placed in portraits, upon information and belief, said condition was created at the request of the organizing party of this election reception (the Republican Party of Tennessee) and if Plaintiffs contend that it was improper to request placement of the flags, Defendant identifies said organizer and host of the reception as a potentially negligent party to the extent supported by the proof.

Ten months after filing its Answer, the hotel filed its First Amended Answer to the Complaint. In the Amended Answer the hotel admitted that one of the flags it had draped over a presidential portrait had fallen earlier on the day in question and that it knew of that fact prior to the incident involving Mr. Allen. The hotel also revised one of its "Affirmative and/or Additional Defenses," stating:

> 2. Plaintiff's injuries were caused by the negligence of the Tennessee Republican Party. Upon information and belief, the Tennessee Republican Party was responsible for the placement of the flag at issue that allegedly struck Plaintiff. Defendant pleads the doctrine of comparative fault as to the Tennessee Republican Party.

In response to the hotel's First Amended Answer, the plaintiffs filed an Amended Complaint in which it named the TRP as an additional defendant. The TRP timely filed its Answer in which it denied liability and asserted that the plaintiffs' claims were barred by the one-year statute of limitations.

After the parties engaged in discovery, both defendants filed dispositive motions. The hotel filed a Motion for Summary Judgment on December 13, 2006. In support of its motion, the hotel contended the plaintiffs had failed to present evidence that the hotel created an unsafe condition or the hotel knew or should have known of an unsafe condition. The TRP filed a Motion for Judgment on the Pleadings and a Motion for Summary Judgment. In the Motion for Judgment on the Pleadings, the TRP asserted the claims against it were time barred because the plaintiffs did not institute an action against it until the statute of limitations and the additional ninety-day window afforded by Tenn. Code Ann. § 20-1-119(a) had run.

The trial court denied the TRP's Motion for Judgment on the Pleadings, finding that the hotel's affirmative defense asserted in its initial Answer did not sufficiently allege facts to "trigger" the running of the ninety-day window afforded by Tenn. Code Ann. § 20-1-119(a), but that the affirmative defense asserted thereafter in the First Amended Answer did, and the plaintiffs' timely filed their action soon thereafter. Nevertheless, the trial court summarily dismissed the claims against both defendants by granting their respective motions for summary judgment. This appeal followed.

ANALYSIS

The plaintiffs appeal the trial court's grant of summary judgment to both defendants. The TRP also appeals the trial court's denial of its Motion for Judgment on the Pleadings. We will first address the issue raised by the TRP, which is whether the plaintiffs' claims against the TRP are time barred.

I.
CLAIMS AGAINST THE TENNESSEE REPUBLICAN PARTY

It is undisputed that the plaintiffs did not assert a claim against the TRP for more than one year after the incident at the hotel. Thus, the plaintiffs' claims against the TRP are time barred unless they come within an exception to the statute of limitations. *See Austin v. State*, 222 S.W.3d 354, 356-57 (Tenn. 2007); *see also* Tenn. Code Ann. § 28-3-104(a)(1).

The exception at issue arises under Tenn. Code Ann. § 20-1-119(a), which may occur when comparative fault becomes an issue. The statute creates a ninety-day window of opportunity during which a plaintiff may add a defendant to an existing action after the statute of limitations has expired as to the potential defendant. The window of opportunity arises if and when a defendant in an existing action alleges in an Answer or Amended Answer that "a person not a party to the suit *caused or contributed to the injury* or damage for which the plaintiff seeks recovery."[5] Tenn. Code Ann. § 20-1-119(a) (emphasis added). The statute provides:

> In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint . . . alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against such person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging such person's fault, either: (1) Amend the complaint to add such person as a defendant

[5] As the Supreme Court explained in *Austin*, the statute provides "an injured party with a fair opportunity to bring before the court all persons who caused or contributed to the party's injuries." *Austin,* 222 S.W.3d at 357 (quoting *Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 451 (Tenn. Ct. App. 2001)).

> pursuant to Rule 15 of the Tennessee Rules of Civil Procedure and cause process to be issued for that person; or (2) Institute a separate action against that person by filing a summons and complaint.

Tenn. Code Ann. § 20-1-119(a).

As our Supreme Court has explained, Tenn. Code Ann. § 20-1-119(a) "gives a plaintiff an additional ninety days to file suit against a potential nonparty tortfeasor whenever a defendant's answer gives a plaintiff *notice of the nonparty's identity* and *alleges facts that reasonably support a conclusion that the nonparty caused or contributed to the plaintiff's injury*." *Austin*, 222 S.W.3d at 355 (emphasis added). The Supreme Court further explained that the statute does not require a defendant "to allege the fault of the nonparty explicitly or use the words 'comparative fault.'" *Id.* at 358. Further, Tenn. Code Ann. § 20-1-119 "applies whether the nonparty is alleged to be partially responsible or totally responsible for the plaintiff's injuries." *Id.* at 355 (emphasis added).

The plaintiffs' cause of action arose on November 2, 2004; however, the plaintiffs did not file an action against the TRP within one year after their cause of action accrued. Thus, when the hotel filed its Answer to the Complaint on November 14, 2005, the statute of limitations had expired on any claim the plaintiffs may have asserted against the TRP.

In its initial Answer, the hotel named the TRP as "a potentially negligent party." The relevant affirmative defense stated in the hotel's Answer, reads as follows:

> 2. To the extent that Plaintiffs claim that the offending condition was caused because of flags being placed in portraits, upon information and belief, *said condition was created at the request of the organizing party of this election reception (the Republican Party of Tennessee)* and if Plaintiffs contend that it was improper to request placement of the flags, *Defendant identifies said organizer and host of the reception as a potentially negligent party* to the extent supported by the proof. (Emphasis added).

The trial court determined that the affirmative defense set forth in the Answer did not "sufficiently allege facts setting forth the negligence of Defendant Tennessee Republican Party as required in *Austin v. State*, 222 S.W.3d 354 (Tenn. 2007), so as to trigger the statute of limitations set forth in TCA § 20-1-119." Therefore, the trial court concluded the ninety day window of opportunity did not begin to run on November 14, 2005. Instead, the trial court determined that it did not begin to run until the hotel amended its First Amended Answer several months later. Based upon this determination, the trial court held that the plaintiffs timely added the TRP as a defendant.

We are in agreement with the trial court's determination that the Supreme Court ruling in *Austin* is controlling; however, we interpret *Austin* differently from the trial court. As a consequence, we have concluded the affirmative defense asserted by the hotel in its initial Answer

was sufficient to trigger the running of the statute of limitations set forth in Tenn. Code Ann. § 20-1-119.

The plaintiffs in *Austin*, David and Tina Austin, were traveling at night on Mt. Pleasant Road in rural Fayette County.[6] As they approached the intersection with Highway 57, Mr. Austin drove through the stop sign crashing into a ditch on the other side of the highway. The accident occurred on October 18, 2002. On June 4, 2003, the Austins filed a complaint against Fayette County alleging they were injured as a result of the County's negligence in failing to properly maintain the intersection.[7] *Id.* at 356. In its Answer filed on October 17, 2003, the County alleged that

> the traffic sign in question was not placed there by the Defendant, Fayette County, Tennessee; that it is in the right of way of the State of Tennessee; that it is under the control of the State of Tennessee; that Fayette County, Tennessee has no control over said stop sign, its placement, maintenance, etc [.] and that it cannot be held liable for the stop sign regardless of its condition.

Id. Fayette County also claimed that it was not "engaged in maintenance of the roadway at or near the intersection of Mt. Pleasant Road and Highway 57 including but not limited to the maintenance of lighting, barricades and other traffic devices as they were under the control of the State of Tennessee." *Id*.

After receiving the County's Answer, the Austins filed a claim against the State of Tennessee by filing a complaint on January 7, 2004, in the Tennessee Claims Commission, making essentially the same allegations of negligence against the State they had made against the County. *Id.* In response to the Complaint filed against it, the State filed a motion for summary judgment on the grounds that the Austins' claims were time barred. *Id.* The Austins responded, arguing that the County's answer alleged the State's comparative fault, which afforded them ninety days to file suit against a nonparty pursuant to Tennessee Code Annotated § 20-1-119. *Id.* The trial court granted the motion for summary judgment, concluding that "Tennessee Code Annotated section 20-1-119 is not applicable because Fayette County's answer does not allege the State's comparative fault but merely alleges that the Austins misidentified Fayette County as the proper defendant." *Id*. The decision of the trial court was affirmed by this court. The Supreme Court, however, rejected the State's contention that Tenn. Code Ann. § 20-1-119 requires defendants to "allege explicitly that the nonparty tortfeasor caused or contributed to the plaintiff's injury." *Id*. at 357 (citing *Browder v. Morris*, 975 S.W.2d 308, 312 (Tenn. 1998)). It additionally stated that the Supreme Court had previously rejected similar arguments "that narrowly construe Tennessee Code Annotated section

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[6] The Austins' minor daughter was also traveling with them that night. For purposes of clarity, we have omitted the minor's claim from this discussion as it is not relevant to illustrate the issue at hand.

[7] Specifically, they alleged the County was negligent by failing to place the stop sign so that it was visible at night, failing to place warning signs, failing to illuminate the area properly, failing to place barriers or signs between Highway 57 and the ditch, and failing to maintain the vegetation properly to give motorists an unobstructed view of the stop sign. *Austin*, 222 S.W.3d at 356.

20-1-119 and have applied the statute in a manner consistent with the concepts of fairness and efficiency that underlie the comparative fault system." *Id*. at 357. The Supreme Court observed that a "defendant is not required to allege the fault of the nonparty explicitly or use the words 'comparative fault,'" and may successfully raise the defense of comparative fault by "set[ting] forth affirmatively facts in short and plain terms relied upon to constitute . . . comparative fault (including the identity or description of any other alleged tortfeasors)." *Id*. at 357-58 (citing Tenn. R. Civ. P. 8.03).

The Court further noted that the determination of whether comparative fault is an issue "cannot turn on the presence or absence of such precise language" and Tenn. Code Ann. § 20-1-119 applies "whenever a defendant's answer gives a plaintiff notice of the identity of a potential nonparty tortfeasor and alleges facts that reasonably support a conclusion that the nonparty caused or contributed to the plaintiff's injury." *Id*. at 357-58 (citing *Romine v. Fernandez*, 124 S.W.3d 599, 604-05 (Tenn. Ct. App. 2003) (holding that a defendant who gave plaintiff sufficient notice of a nonparty tortfeasor had raised the defense of comparative fault even though he did not explicitly allege the fault of the nonparties)). Based upon the foregoing principles, the Supreme Court reversed the decision of the trial court and this court, concluding that the statute was triggered when Fayette County alleged in its answer that the stop sign "is in the right of way of the State of Tennessee [and] under the control of the State of Tennessee" and that the State is responsible for the "maintenance of the roadway at or near the intersection of Mt. Pleasant Road and Highway 57." *Id*. at 358.

As was the case in *Austin*, the hotel's initial Answer expressly identified a nonparty, the TRP. As was the case in *Austin*, the hotel's Answer did not explicitly allege that the nonparty was at fault; however, it did expressly state that the "offending condition" that led to the plaintiffs' injuries was *created* at the request of the TRP. We read this to mean that the "offending condition" that led to the plaintiff's injuries was *caused* by the TRP. Because the determination of whether comparative fault is an issue is not subject to a "precise legal formula," *see Id.* at 357 (citing *Romine*, 124 S.W.3d at 604-05), we have concluded that it was not necessary for the hotel to expressly state "comparative fault" or that the TRP was "at fault" to trigger the ninety-day window afforded by Tenn. Code Ann. § 20-1-119.

The clear implication of the allegation in the hotel's Affirmative Defense in its initial Answer that the TRP created the "offending condition" is that any negligence in the placement of the flags over the portraits in the ballroom should be attributed to the TRP. To trigger the running of the ninety-day window, a defendant's Answer should convey "the clear implication of the allegation that some of the negligence, if any, 'should be attributed to' the nonparty." *Id*. at 358. Here, the allegations reasonably support a conclusion that the TRP "is responsible for" the plaintiffs' injuries, at least in part. We, therefore, conclude the hotel's allegation that the TRP caused or contributed to the plaintiffs' injuries was sufficient to trigger Tenn. Code Ann. § 20-1-119(a); therefore, the plaintiffs had no more than ninety days from the filing of the hotel's initial Answer in which to add the TRP as a party defendant, otherwise, the statute of limitations would once again expire. The plaintiffs did not add the TRP as a party within the ninety-day window; therefore, the plaintiffs' claims against the TRP are time barred.

Accordingly, the TRP is entitled to judgment on the pleadings based on the statute of limitations defense.[8]

II.
CLAIMS AGAINST THE HERMITAGE HOTEL

The plaintiffs contend the trial court erred in granting summary judgment to the hotel by, *inter alia*, weighing disputed evidence in favor of the hotel, drawing inferences in favor of the hotel, and accepting disputed facts as undisputed.

In this premises liability case, the hotel, as the owner and occupier of the premises, was under a duty to use ordinary care, which is "the care that ordinarily careful persons would use to avoid injury to themselves or others under the same or similar circumstances." T.P.I. 8– Civil 9.01, 8 TENNESSEE PRACTICE: TENNESSEE PATTERN JURY INSTRUCTIONS 390 (8th ed. 2008) ("T.P.I. 8-Civil 9.01"); *see Martin v. Washmaster Auto Ctr., U.S.A.*, 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996). For the plaintiffs to recover for an injury caused by an alleged unsafe condition, the plaintiffs must show that the hotel either "created the unsafe condition or knew of it long enough to have corrected it . . . before plaintiff's injury, or that the unsafe condition existed long enough that the [hotel], using ordinary care, should have discovered and corrected . . . the unsafe condition." T.P.I. 8-Civil 9.02; *accord Blair v. West Town Mall,* 130 S.W.3d 761, 764 (Tenn. 2004). "An unsafe condition is a condition which creates an unreasonable risk of harm." T.P.I. 8-Civil 9.02*; see Friedenstab v. Short*, 174 S.W.3d 217, 225-226 (Tenn. Ct. App. 2004). When deciding if the hotel used such care, the finder of fact "should consider all the surrounding circumstances." T.P.I. 8 –Civil 9.01.

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. *See Martin v. Norfolk Southern Railway Co.*, No. E2006-01021-SC-R11-CV, 2008 WL 4890252, ___ S.W.3d ___ (Tenn. Nov. 14, 2008); *Hannan v. Alltel Publ'g Co.*, No. E2006-01353-SC-R11-CV, 2008 WL 4755788, ___ S.W.3d ___ (Tenn. Oct. 31, 2008). The summary judgment analysis to be used is as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material

[8] Having determined that all of the plaintiffs' claims against the TRP are barred by the statute of limitations, whether the TRP was additionally entitled to have the case dismissed on summary judgment is therefore moot.

fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, ___ S.W.3d ___, ___ (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, ___ S.W.3d at ___. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed."

> *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

Martin, 2008 WL 4890252, at *___, ___ S.W.3d at ___.

In the hotel's motion for summary judgment, it contended "the plaintiffs can come forward with no evidence that the Hermitage Hotel had notice that the flag that struck Mr. Allen was hung over the landscape painting in an unreasonably dangerous manner." The hotel also asserted in its motion that "[t]he plaintiffs have no evidence that the Hermitage Hotel played any role in hanging the flag in question." The hotel's contentions constitute the type of "put up, or shut up" contentions our Supreme Court has deemed insufficient in the context of a motion for summary judgment. *See Hannan*, 2008 WL 4755788, at * __, ___ S.W.3d at ___ (stating "[i]t is not enough for the moving party to challenge the nonmoving party to "put up or shut up"). For purposes of summary judgment, it is also insufficient for the moving party to merely "cast doubt" on the plaintiff's "ability to prove an element at trial." *Id*.

The hotel, as the moving party, had the burden to *negate* an essential element of the plaintiffs' claim or establish that the plaintiffs *cannot prove* an essential element of their claim at trial. *Martin*, 2008 WL 4890252, at *___, ___ S.W.3d. at ___ (citing *Hannan*, 2008 WL 4755788, at * __, ___ S.W.3d at ___; *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5). Therefore, the hotel was required to shift the burden of production to the plaintiffs by either affirmatively negating an essential element of the plaintiffs' claim or showing that the plaintiffs cannot prove an essential element of their claim at trial. *Martin*, 2008 WL 4890252, at *___; *Hannan v. Alltel Publ'g Co.*, ___ S.W.3d at ___; *McCarley*, 960 S.W.2d at 588. We have determined the hotel failed to do that.

For purposes of summary judgment, we find it significant that the hotel admitted hanging "several flags," at least three, and that the hotel knew that one of the flags its staff placed over a presidential portrait fell that evening prior to Mr. Allen's incident. We also find it significant that the hotel has not and cannot negate the fact that its staff may have placed the flag that fell on Mr. Allen. This fact can be reasonably inferred from the testimony of Ms. Pam Luttermoser and Mr. Eugene Sessa, the hotel managers responsible for planning, setup and overseeing the TRP event. Ms. Luttermoser, a Certified Meeting Professional, testified that she was the hotel representative who met with Bob Davis, Deputy Chair of the TRP, days prior to the election watch party to plan the event. As she explained it, the TRP stated that it did not have flags large enough to drape over the large portraits and that the TRP requested the hotel not only provide the flags but also hang the flags. As she explained it, the TRP did not request the hotel's permission for the TRP to hang any flags; instead, the TRP asked the hotel to hang the flags. Mr. Sessa, the hotel banquet manager, testified that when the flag fell from one of the presidential portraits, he called his maintenance staff to bring a ladder so that he, Mr. Sessa, could rehang the flag that fell. This confirms the fact the hotel knew one of the flags had fallen, and thus others might. This also supports the contention that the TRP did not have the means to hang the flag that fell on Mr. Allen, meaning the TRP did not have a

ladder, which would be necessary to hang the flag over a painting that was approximately twelve feet above the floor of the ballroom.

Because the hotel cannot negate the fact that one of its employees may have placed the flag that fell on Mr. Allen, we must therefore infer for purposes of our summary judgment analysis that the hotel created the condition at issue, meaning the hotel placed the flag over the landscape painting. From this we must also infer for purposes of summary judgment that the hotel was aware the flag was large and heavy, that the pole attached to it was sizeable, one and one-quarter in diameter, and that it was foreseeable this may have constituted an unsafe condition.

For the reasons stated above, we have determined the hotel failed to negate an essential element of the plaintiffs' claims and it failed to establish that the plaintiffs' cannot prove an essential element of their claim at trial. Thus, the hotel is not entitled to summary judgment based on the evidence in the record at this time.

IN CONCLUSION

We, therefore, reverse the summary dismissal of the plaintiffs' claims against Historic Hotels of Nashville, LLC, and remand this case to the trial court for the entry of an order granting the Motion of the Tennessee Republican Party for Judgment on the Pleadings, and for further proceedings as it pertains to the plaintiffs' claims against Historic Hotels of Nashville, LLC.

One-half of the costs of appeal are assessed against the plaintiffs and one-half of the costs are assessed against Historic Hotels of Nashville, LLC.

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FRANK G. CLEMENT, JR., JUDGE